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FREQUENTLY ASKED QUESTIONS ABOUT QUALIFICATIONS-BASED SELECTION FOR PUBLIC PROJECTS AS DEFINED BY T.C.A. § 12-4-107(a)

1. To what projects does T.C.A. § 12-4-107(a) apply?

T.C.A. § 12-4-107 applies to all contracts for architectural, engineering and construction services procured by any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute. Some communications from the Board refer to “public works projects,” which should not be understood in the narrow sense of projects typically associated with public works departments. The term “public works” is used in the general sense of any project paid for by government funds for public use. The statute does not actually use the term “public works.”

2. What has changed? Is the Board of Architectural and Engineering Examiners imposing a new requirement?

The requirement to select design professionals for public projects through qualifications-based selection is not a new requirement. This requirement has been in the law for many years, and the Board of Architectural and Engineering Examiners is not imposing any additional requirements on the state or local jurisdictions. The only change is that, effective March 11, 2013, the Board may now discipline registered architects, engineers, and landscape architects for failing to comply with T.C.A. § 12-4-107(a) and Rule 0120-02-.02(6).

3. Does T.C.A. § 12-4-107(a) encompass studies and other services that do not involve the preparation of sealed plans?

Any study or service that requires professional architectural, engineering, or landscape architectural services and expertise that requires the seal of a

registrant, or if these professional services are offered by the proposer, would fall under the scope of the statute.

4. Does T.C.A. § 12-4-107(a) apply to public school systems and public building authorities?

Yes. T.C.A. § 12-4-107 applies to all contracts for professional services by any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute.

5. Does T.C.A. § 12-4-107(a) apply to non-profit organizations that receive public funds, such as charter schools?

No. T.C.A. § 12-4-107 applies only to contracts for professional services by any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute. It does not apply to private non-profit organizations, regardless of the source of funding. However, although T.C.A. § 12-4-107(a) does not require qualifications-based selection in these instances, the conditions of the source of funding, such as a governmental grant, may still require qualifications-based selection.

6. Does T.C.A. § 12-4-107(a) apply to landscape architectural services?

Yes. Although the statute does not specifically reference landscape architectural services, it may be safely assumed that such services are included due to the overlap among the architectural, engineering, and landscape architectural professions, and the fact that similar qualifications and standards apply to all three design professions. Additionally, Rule 0120-02-.02(6) does reference landscape architectural services.

7. Does T.C.A. § 12-4-107(a) apply to interior design services?

No. The statute does not reference interior design services, and the Board of Architectural and Engineering Examiners does not regulate the practice of interior design—only use of the title “registered interior designer.”

8. Is it permissible for a registrant to provide a description of intended compensation (i.e., whether you charge a fixed fee, percentage, etc.) in response to a RFQ/RFP for a public project?

Yes, provided that a specific monetary amount or percentage is not included in the response.

9. Is it permissible for a registrant to submit hourly rates and an estimate of man-hours required to complete a design project in response to a RFQ/RFP for a public project?

No. T.C.A. § 12-4-107(a) and Rule 0120-02-.02(6) preclude a registrant from submitting any information that could be used to determine compensation in response to a RFQ/RFP for a public project.

10. Is it permissible for a registrant to submit a price in a sealed envelope in response to a RFQ/RFP for a public project?

No. Registrants may only state compensation to a prospective client in direct negotiation following selection based on qualifications.

11. Does the following procedure comply with T.C.A. § 12-4-107 and Rule 0120-02-.02(6)?

A jurisdiction requests responses to a RFQ. Responses are evaluated to prequalify firms for participation in the RFP process. Prequalified proposers then submit formal proposals (RFPs)—including fees— for consideration and final selection.

No. The prequalification procedure outlined above would not comply. In accordance with T.C.A. § 12-4-107(a), once the public body (client) has selected the most qualified design professional/firm, it may request a fee proposal from that firm. The agency may then negotiate a satisfactory contract with the selected firm. If an agreement cannot be reached and the negotiations are formally terminated, the agency may then proceed to select the next most qualified design professional/firm on the list and continue negotiations until an agreement is reached. However, a procedure in which the agency wishes to contract with as many qualified respondents as possible, multiple firms are selected, and a contract is negotiated with each firm separately following selection based on qualifications would be in compliance.

12. What alternate methods are available for determining possible architectural, engineering, or landscape architectural costs?

- a. Enlist the aid of a professional or agency such as a Development District in determining the scope of the project for a RFQ. This should

allow a realistic budget for the entire project, including construction, so that price surprises are minimized.

- b. State the budget range for professional services in the RFQ. The budgeted amount allows the design professional to determine if they can meet the stated requirements within the budget range and minimizes review time for the municipality.
- c. Use standard cost basis schedules such as used by the State Building Commission or Rural Development to determine expected design costs. These schedules have been used for many years by both governments and design professionals to establish reasonable compensation for projects of various sizes.

13. Is it unethical for one firm/registrant to sit in on a proposal interview for another firm/registrant (a competitor)? Would this be a violation of the Rules of Professional Conduct?

Although such conduct is unprofessional, it does not violate the Rules of Professional Conduct.

14. Does Rule 0120-02-.02(6) apply only to individual design professionals, or does it also apply to corporations, partnerships, and firms?

The rule applies to both individual design professionals and corporations, partnerships, and firms registered in the State of Tennessee (see Rule 0120-02-.01 Applicability).

15. What disciplinary action may result from a violation of Rule 0120-02-.02(6)?

Formal discipline could range from a civil penalty (\$100-\$1,000 per violation) to suspension or even revocation for repeated, grave offenses. The Board considers mitigating and aggravating factors when determining discipline.

16. Can price be considered when selecting a design professional for a public project?

The law does not prevent jurisdictions from negotiating price on projects requiring professional services. Upon selecting the most qualified design professional, the jurisdiction may then negotiate compensation with the registrant/firm. If the contracting agency and most highly qualified firm are unable to negotiate a fair and reasonable contract, the agency may formally terminate negotiations and

undertake negotiations with the next most qualified firm, continuing the process until an agreement is reached. The initial selection, however, must be based upon qualifications.

17. Does T.C.A. § 12-4-107(a) and Rule 0120-02-.02(6) apply to transportation planning services for Metropolitan Planning Organizations?

See response to question #3.

18. Does T.C.A. § 12-4-107(a) and Rule 0120-02-.02(6) apply to subconsultants who do not contract directly with a government agency?

No, based on the Board's current interpretation of the statute. T.C.A. § 12-4-107(a) applies only to contracts between a state or local government agency and an architect/engineer/landscape architect. If a registrant is not entering into a contract with a governmental entity, then they may include a fee in their proposal for a public project. However, in keeping with the spirit of the law, the Board urges registrants to select subconsultants on the basis of their qualifications.

19. What is an appropriate way for a registrant to respond to a request for a price?

If a registrant becomes aware of a state or local agency that is requesting a fee in a proposal for a public project, this should be brought to the attention of the Board office. In such cases, Board staff will send a letter to the agency issuing the RFP asking them to eliminate fees from their request. The Board has no jurisdiction over state and local government agencies, but, in most cases, the issuing agency will voluntarily remove the requirement to submit fees and reissue the request. Registrants may wish to provide information on Tenn. Code Ann. § 12-4-107(a) and Rule 0120-02-.02(6) to prospective clients so they will understand why submittals for public projects are non-responsive on the issue of fees. State professional societies may also offer assistance in educating government agencies regarding qualifications-based selection.

The above responses reflect the Board of Architectural and Engineering Examiners' interpretation of T.C.A. § 12-4-107, as necessary to enforce Rule 0120-02-.02(6), and were adopted on June 12, 2014, and revised and adopted on October 10, 2014, June 4, 2015, and August 12, 2015. The above responses should not be viewed as comprehensive, and registrants are urged to contact the Board office for questions that are not addressed in this document.